INDEX

	Page
Statement	1
Questions presented	2
Argument	3
The first question	3
Applicable statutes	3
Section 3466 of the Revised Statutes	3
The bankruptcy act of 1898, section 64	3
Brief of argument	5
Preliminary considerations	10
1. When the bankruptcy act of 1898 was adopted the United States had priority for all debts. The question, therefore, is not whether the bankruptcy act gave the Government priority for debts other than taxes, but whether it destroyed a priority which the Government already possessed	12
2. Since section 3466, R. S., was not expressly repealed by the bankruptcy act of 1898, the Government's right of priority could have been destroyed only by such inconsistency or repugnancy between the two statutes as makes it impossible to give effect to both of them	16
3. Since it is possible to give effect to both statutes by construing the term "person" as used in section 64 b (5) of the bankruptcy act of 1898 to include the United States, that construction must be adopted	18
4. The United States is a person within the meaning of section 64 b (5) of the bankruptcy act of 1898	21
5. Neither the phraseology of the act of 1898, considered in connection with that of prior bankruptcy acts, nor the legislative history of that act discloses any purpose to destroy the priority of the United States for debts other than taxes	32
6. Congress having declared it to be the national policy that the Government should have priority in bankruptcy proceedings for both debts and taxes, the wisdom of the policy is not open to question in the courts. Moreover, the policy declared by Congress accords with the dictates of a sound policy	41
The second question	46
7. This court has repeatedly held that claims of the Director General of Railroads arising out of Federal control are claims of the United States of America in its sovereign capacity	46

AUTHORITIES CITED

	Page
Atlantic, Gulf & Pacific Steamship Co., Matter of, 289 Fed. 145	15
Barney v. *Dolph*, 97 U. S. 652	17
Bate Refrigerating Co. v. *Sulzberger*, 157 U. S. 1	15
Beals v. *Hale*, 4 How. 37	17
Beaston v. *Farmers Bank*, 12 Pet. 102	13
Benziger v. *United States*, 192 U. S. 38	35
Blair v. *Chicago*, 201 U. S. 400	15
City of Richmond v. *Bird*, 249 U. S. 174	20
Cotton v. *United States*, 11 How. 229	23, 24
Davis v. *Corona Coal Company*, 265 U. S. 219	49, 50
Davis v. *Michigan Trust Company*, 2 F. (2d) 194	49
Davis v. *Miller-Link Company*, 296 Fed. 649	48
Davis v. *Pullen*, 277 Fed. 650	48
Devlin, In re, 180 Fed. 170	15
Dickson v. *United States*, 125 Mass. 311	23
Dixon v. *United States*, 1 Brock, 177, Fed. Cas. No. 3934	23
du Pont de Nemours v. *Davis*, 264 U. S. 456	47, 49, 50
Gidding v. *Haltor*, 19 Mont. 263	24
Guarantee Company v. *Title Guaranty Company*, 224 U. S. 152	11, 12, 13, 16, 17, 18, 26, 32, 34, 36
Gubelman, In re	15
Harper, In re, 175 Fed. 412	23
Hibner Oil Company, In re, 264 Fed. 667	15, 48
Holden v. *Stratton*, 198 U. S. 202	16
In re Devlin, 180 Fed. 170	15
In re Gubelman	15
In re Harper, 175 Fed. 412	23
In re Hibner Oil Company, 264 Fed. 667	15, 48
In re Stoever, 127 Fed. 394	15
In re Tidewater Coal Exchange, 280 Fed 648	15, 28, 48
In re Western Implement Company, 166 Fed. 576; 171 Fed. 81	15
In re Worcester County, 102 Fed. 809	15
Kohlsaat v. *Murray*, 96 U. S. 153	17
Lewis, Trustee, v. *United States*, 92 U. S. 618	11, 14, 16, 17
Marshall v. *New York*, 254 U. S. 380	30
Matter of Atlantic Gulf & Pacific Steamship Co., 289 Fed. 145	15
Missouri Pacific R. R. Company v. *Ault*, 256 U. S. 554	49, 50
Murray v. *Wilson Distilling Company*, 213 U. S. 151	17
Oliver v. *United States*, Oct. Term, 1924, No. 180	20
People v. *St. Louis*, 10 Ill. 351	23
Peters v. *Grubb*, 21 Pa. St. 455	24
Plummer v. *Murray*, 51 Barb. (N. Y.) 201	17
Reform, The, 3 Wall. 617	17
Republic of Honduras v. *Soto*, 112 N. Y. 310	24
Respublica v. *Sweers*, 1 Dall. (Pa.) 41	23
Richmond v. *Bird*, 249 U. S. 174	20
Smoot's case, 15 Wall. 36	48

Page

Standard Oil Company v. *Southern Pacific Company*, U. S. Sup. Ct. decided April 20, 1925 ---- 50
Stanley v. *Schwalby*, 147 U. S. 508 ---- 24
State of Indiana v. *Woram*, 6 Hill (N. Y.), 33 ---- 23, 24
State v. *Herold*, 9 Kan. 194 ---- 24
Stoever, In re, 127 Fed. 394 ---- 15
Territory v. *Hildebrand*, 2 Mont. 426 ---- 23
Texas & Pacific Railroad Company v. *Abilene Company*, 204 U. S. 426 ---- 15
The Reform, 3 Wall. 617 ---- 17
Tidewater Coal Exchange, In re, 280 Fed. 648 ---- 15, 28, 48
Union Pacific Railroad Company v. *Mason City Railroad Company*, 199 U. S. 160 ---- 15
United States v. *Birmingham Trust & Savings Co.* 258 Fed. 562 ---- 15
United States v. *Fisher*, 2 Cranch, 358 ---- 11, 13, 14, 16, 45
United States v. *Herron*, 20 Wall, 251 ---- 16, 36
United States v. *Maurice*, 2 Brock, 96 Fed. Cas. No. 15747 ---- 23
United States v. *National Surety Company*, 254 U. S. 73 ---- 11, 29, 31, 32
United States v. *State Bank of North Carolina*, 6 Pet. 29 ---- 11, 43
United States v. *Trans-Missouri Freight Ass'n.*, 166 U. S. 290 ---- 41
United States v. *Walker*, 22 How. 299 ---- 17
United States v. *Wood*, 290 Fed. 109 ---- 17, 28
United States Fidelity Co. v. *Bray*, 225 U. S. 205 ---- 12
Van Brocklin v. *Tennessee*, 117 U. S. 151 ---- 23
Walkof v. *Fox*, 153 N. Y. Supp. 27 ---- 15
Western Implement Company, In re, 166 Fed. 576, 171 Fed. 81 ---- 15
Wood v. *United States*, 16 Pet. 342 ---- 17, 28
Worcester County, In re, 102 Fed. 809 ---- 15

STATUTES

Bankruptcy act of 1898, section 64 ---- 3, 4, 5
R. S. 3466 ---- 3

LEGISLATIVE RECORDS

Senator Hoar's speech, 48th Cong., 1st sess., p. 3004 ---- 40
Lindsay bill, 55th Cong., 1st sess., p. 601 ---- 37
Nelson bill, 55th Cong., 1st sess., pp. 799, 800 ---- 37
House bill, H. R. Rep. 65, 55th Cong., 2d sess.; Cong. Rec., 55th Cong., 2d sess., p. 1778 ---- 38
Conference Rep., Sen. Doc. 294, 55th Cong., 2d sess ---- 38

In the Supreme Court of the United States

OCTOBER TERM, 1924

JAMES C. DAVIS, DIRECTOR GENERAL AND Agent (Atlantic Coast Line), petitioner
v.
E. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY of the Estate of Charles F. Boyd Company, Inc., Bankrupt, respondent — No. 786

JAMES C. DAVIS, DIRECTOR GENERAL AND Agent (Seaboard Air Line), petitioner
v.
E. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY of the Estate of Charles F. Boyd Company, Inc., Bankrupt, respondent — No. 787

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

STATEMENT

These writs of certiorari bring up for review decisions of the Circuit Court of Appeals for the Fourth Circuit, affirming two orders of the United

States District Court of the Eastern District of South Carolina which denied petitioner's claims for priority in a bankruptcy proceeding.

Claims for freight, storage, demurrage, and war tax, aggregating $4,421.13, arising out of the operation of the Seaboard Air Line and Atlantic Coast Line during Federal control, were filed in the bankruptcy proceeding of Charles F. Boyd Company Inc., bankrupt, by the petitioner, the Director General of Railroads. The merchandise, after having been held in storage for one hundred and fifty-eight days, had been sold by the Director General of Railroads, and the proceeds of the sale credited on the claims. (R. pp. 11–13.)

The referee reported against the claim of priority, and the United States District Judge confirmed the report on the ground that the claims were due to the Director General of Railroads and not to the United States. The Circuit Court of Appeals rejected the opinions of the referee and the district court, but affirmed the orders with a decision that the United States was not entitled to priority except for taxes.

QUESTIONS PRESENTED

The sole questions presented are:

(A) Whether the United States is entitled to priority in bankruptcy proceedings for debts other than taxes; and

(B) If the first question is answered in the affirmative, whether the petitioner has such priority.

A

THE FIRST QUESTION

APPLICABLE STATUTES

Section 3466 of the Revised Statutes

Section 3466 of the Revised Statutes (Compiled Statutes of 1916, Section 6372) provides as follows:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

The Bankruptcy Act of 1898

Section 64 of the Bankruptcy Act, 30 Stat. 563, as amended by 32 Stat. 800 and 34 Stat. 267 (Comp. Stat. § 9648), provides:

> Debts which have priority.—*a* The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of

dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

b The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three

months before the date of commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

BRIEF OF ARGUMENT

A. For the purposes of this discussion the petitioner concedes that the right of the United States to priority of payment is a creature of statute; that the Bankruptcy Act of 1898, unlike prior bankruptcy acts, does contain certain provisions binding upon the United States; that the Bankruptcy Act of 1898 annulled all previous inconsistent statutory provisions; that in so far as Section 3466, R. S., prescribes a different order of priority from that prescribed by Section 64 of the Bankruptcy Act, the former statute must yield to the latter; that the Bankruptcy Act takes into consideration the whole range of the bankrupt's debts and assigns the order of payment; and that under the Bankruptcy Act the jurisdiction of the bankruptcy courts in all proceedings in bankruptcy is intended to be exclusive.

B. The petitioner contends:

I. When the Bankruptcy Act of 1898 was adopted the United States had priority for all debts. The question, therefore, is not whether the Bankruptcy Act *gave* the Government priority for debts other than taxes, but whether it *destroyed* a priority which the Government already possessed.

(*a*) When the Act of 1898 became a law the United States, for more than a century, had been and was then entitled to priority of payment from the assets of insolvents, under Section 3466, R. S.

(*b*) The Government's right of priority under Section 3466, R. S., was an extensive one.

(*c*) Prior bankruptcy acts had left the Government's right of priority undisturbed and unimpaired.

(*d*) The Government's priority, therefore, required no re-creation and no reenactment in the Act of 1898. For it to continue indefinitely, it was only necessary that it should be left alone.

(*e*) If the Act of 1898 destroyed the Government's priority for debts other than taxes, it did it so subtly that both the bench and the bar for a generation have been unaware of it.

(*f*) With the exception of the court below, the courts have uniformly recognized the Government's priority for debts as well as taxes in bankruptcy.

II. Since Section 3466, R. S., was not expressly repealed by the Bankruptcy Act of 1898, the Government's right of priority could have been destroyed only by such inconsistency or repugnancy between the two statutes as to make it impossible to give effect to both of them.

III. Since it is possible to give effect to both statutes by construing the term "person" as used in Section 64 b (5) of the Bankruptcy Act to include the United States, that construction must be adopted.

(*a*) The Bankruptcy Act is fairly susceptible of no other construction than that Congress intended, not to destroy the Government's priority, but merely to change its order of payment.

(*b*) Construed in that manner the Bankruptcy Act and Section 3466, R. S., become harmonious and full effect is given to both.

(*c*) Section 64 of the Bankruptcy Act is not a self-sufficient code of priorities, but it expressly incorporates within itself all relevant Federal and State laws, including Section 3466, R. S.

IV. The United States is a person within the meaning of Section 64 b (5) of the Bankruptcy Act.

(*a*) The Bankruptcy Act defines "corporations" as *all bodies* having *any* of the powers and privileges of private corporations not possessed by individuals or partnerships, and provides that "persons" shall include corporations. The definition is not limited to private corporations.

(*b*) The United States and the States are corporations.

(*c*) As a corporation the United States possesses some of the powers and privileges of private corporations.

(*d*) Again, this court has frequently classified the United States and the States as persons.

(*e*) Since the concept of the United States and the States both as corporations and as persons was a familiar one long prior to the enactment of the Bankruptcy Act, the failure to include them *eo*

nomine within the statutory definitions of "corporations" and "persons" is without significance.

(*f*) In other sections of the Bankruptcy Act the United States and the States are plainly included within the word "persons."

(*g*) In other sections of the Bankruptcy Act the United States and the States are plainly included within personal pronouns.

(*h*) Throughout the Bankruptcy Act the United States and the States are obviously included within other generic terms, such as "creditors," "claimants," and "parties," in accordance with the intention of the draftsman to avoid repetition whenever possible.

(*i*) The United States and the States, as distinguished from their laws, courts, territories, etc., are expressly mentioned in the Act only in six instances, in none of which would it have been possible to include them within generic terms.

(*j*) Thus the Bankruptcy Act contains within itself the guides to its own construction and there is no occasion to seek extraneous aids to construction in the form of prior bankruptcy acts or the legislative history of the present Act.

(*k*) If the United States is not a "person" within the meaning of Section 64 b (5), neither are the States. It may be doubted that Congress intended by such indirection to deprive the States of rights which they had so long possessed.

(*l*) It would seem that the question is no longer an open one in this court.

V. Neither the phraseology of the Act of 1898, considered in connection with that of prior bankruptcy acts, nor the legislative history of that Act discloses any purpose to destroy the priority of the United States for debts.

(*a*) The differences in phraseology between the priority clauses of previous bankruptcy acts and that of the Act of 1898 is sufficiently explained by the legislative purpose to assign a different order to the priority of the United States and the States for their debts.

(*b*) The failure of Congress to recognize the priority of the United States in the Act of 1898 in the identical terms in which that recognition was couched in prior acts did not destroy that priority.

(*c*) The word "person" as used in the priority clause of the Act of 1898 is not restricted in its application by its context as it was in the Act of 1867.

(*d*) In the light of the decisions of this court and of the definitions contained in the Act of 1898, it is impossible to contend that words used in the Act of 1898 in one context should be given the same application which they had when used in a different context in the Act of 1867.

(*e*) Nor does the legislative history of the Act of 1898 disclose any intention to deprive the United States of priority for debts in bankruptcy proceedings.

VI. Congress having decreed it to be the national policy that the Government should have priority in bankruptcy proceedings for both debts and

taxes, the wisdom of the policy is not open to question in the courts. Moreover, the policy declared by Congress accords with the dictates of a sound public policy.

(*a*) The wisdom of the policy is a question for legislative and not for judicial consideration.

(*b*) It is unbelievable that Congress intended to reverse the policy of a century in the present Bankruptcy Act in a manner so difficult of detection that for almost a generation the bench and bar have been unaware of the legislative purpose.

(*c*) A sound public policy does not require that the Government's loss be shifted from the general creditors of a bankrupt to the taxpayers. There is no greater reason why general creditors should bear the loss resulting from the Government's inability to collect its taxes than that resulting from its inability to collect other debts.

(*d*) With knowledge of the construction placed by the Federal courts upon Section 64 of the Bankruptcy Act, Congress has amended that Act nine times, but has not altered the provisions of Section 64 b (5).

PRELIMINARY CONSIDERATIONS

In order to reduce the problem to its ultimate terms, it may be conceded for the purposes of this discussion:

(1) That the right of the United States to priority of payment from the assets of insolvents does not inhere in its sovereignty, but is a creature of

statutes which embody an ancient rule of the common law whereby the sovereign has priority over other creditors of an insolvent. *United States* v. *Fisher,* 2 Cranch. 358; *United States* v. *State Bank of North Carolina,* 6 Pet. 29, 35; *United States* v. *National Surety Company,* 254 U. S. 73, 75. However, the question remains, does the Bankruptcy Act of 1898 repeal Section 3466 R. S. in whole or in part?

(2) That the Bankruptcy Act of 1898, unlike prior bankruptcy acts (*Lewis, Trustee,* v. *United States,* 92 U. S. 618), does contain certain provisions binding upon the United States. *Guarantee Company* v. *Title Guaranty Company,* 224 U. S. 152. However, the question remains, what provisions are binding upon the United States, and whether those provisions are so repugnant to Section 3466 R. S. as to destroy the Government's right to priority for debts other than taxes.

(3) That the Bankruptcy Act of 1898 annulled all previous inconsistent statutory provisions. However, the question remains, whether and to what extent the Bankruptcy Act of 1898 and Section 3466 R. S. are inconsistent.

(4) That in so far as Section 3466 R. S. prescribes a different order of priority from that provided by Section 64 of the Bankruptcy Act of 1898, the former must yield to the latter. However, the question remains, whether the Bankruptcy Act of 1898 does more than change the order of the Government's priority.

(5) That the Bankruptcy Act of 1898 takes into consideration the whole range of indebtedness of the bankrupt—national, state, and individual—and assigns the order of payment. *Guarantee Company* v. *Title Guaranty Company, supra.* However, the question remains, what order of priority was assigned to debts other than taxes due the Government?

(6) That under the Bankruptcy Act of 1898 the jurisdiction of the bankruptcy courts in all proceedings in bankruptcy is intended to be exclusive, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection, and reconsideration of claims, the reduction of the estates to money and its distribution, and the determination of the preferences and priorities to be accorded to claims. *United States Fidelity and Guaranty Company* v. *Bray,* 225 U. S. 205, 217. However, the question remains, what rights of priority the Government possesses?

Point I

When the Bankruptcy Act of 1898 was adopted the United States had priority for all debts. The question, therefore, is not whether the Bankruptcy Act gave the Government priority for debts other than taxes, but whether it destroyed a priority which the Government already possessed

When the Bankruptcy Act became a law on July 1, 1898, the United States for more than a century had been and was then entitled to priority of payment from the assets of insolvents under Section

5 of Chapter 20 of the Act of March 3, 1797 (1 Stat. 515), which was subsequently incorporated into the Revised Statutes as Section 3466. *United States* v. *Fisher, supra.* That statute has a broad application. As this court pointed out in *Beaston* v. *Farmers Bank,* 12 Pet. 102, 134:

> All debtors to the United States, whatever their character, and by whatever mode bound, may be fairly included within the language used in the fifth section of the Act of Congress. And it is manifest, that Congress intended to give priority of payment to the United States over all other creditors, in the cases stated therein.

This court has also pointed out, *Lewis, Trustee,* v. *United States,* 92 U. S. 618, that the language of the statute is without qualification; that it affects all persons indebted to the United States; that the form of the debt is immaterial; and that the only condition of the Government's right to priority is that there be bankruptcy or insolvency as the latter is defined by the statute and the authorities upon the subject.

During the century prior to the adoption of the Act of 1898 successive bankruptcy acts (Act of 1800, Sec. 62, 2 Stat. 19, 36; Act of 1841, Sec. 5, 5 Stat. 440, 444; Act of March 2, 1867, Sec. 28, 14 Stat. 517, 530) had left the Government's right of priority undisturbed and unimpaired, so that in all that period it extended as well to those insolvents who had been formally adjudged bankrupts as to

those who had not. *United States* v. *Fisher, supra; Lewis, Trustee,* v. *United States, supra.*

Immediately prior to the passage of the Bankruptcy Act of 1898, therefore, the Government possessed this ancient right which had persisted in full vigor from the very dawn of the Republic. The Government's right to priority needed no recreation, no reenactment, no affirmation, no sanction. To continue indefinitely it needed only to be left alone. The question is, accordingly, not whether the Bankruptcy Act of 1898 *gave* any right of priority to the United States but whether and to what extent it *took away* the right which the United States then possessed. The question is not whether the Bankruptcy Act *creates* that right but whether it *repudiates* it.

It does not do so expressly. If it reverses the policy of a century, it does it so furtively that for a generation its purpose has not been apparent. Courts and litigants alike have been unaware of it. The annual reports of the Attorneys General show that prior to June 30, 1924, more than 550,000 bankruptcy proceedings were instituted under the Bankruptcy Act of 1898. In all those proceedings and in all that time priority for debts other than taxes has been denied the Government in a single reported decision, that here under review. On July 21, 1899, *little more than a year after the passage of the Act,* the District Court for the District of Massachusetts held a county entitled to priority; on April 20, 1900, the Circuit Court of Appeals af-

firmed that decision (*In re Worcester County,* 102 Fed. 809, 815), in effect sustaining the priority of the United States. For nearly three decades representatives of the Government have consistently asserted that right; the trustees of bankrupts and their attorneys have rarely disputed it; and the courts have invariably recognized it.[1]

The uniform construction placed upon Section 64 of the Bankruptcy Act of 1898 by the lower federal courts will be given weight by this court in construing the same provisions of that Act. *Texas & Pacific Railroad Co.* v. *Abilene Co.,* 204 U. S. 426, 447; *Bate Refrigerating Co.* v. *Sulzberger,* 157 U. S. 1, 34. This court will also give weight to the policy of Congress relating to any matter when construing an act relating to the same subject. *Union Pacific Railroad Co.* v. *Mason City Railroad Co.,* 199 U.S.160, 167; *Blair* v. *Chicago,* 201 U. S. 400, 469. And, as we have seen, in the century preceding the enactment of the Bankruptcy Act of 1898, no principle was more firmly embedded in Congressional policy than that of the Government's priority. An intention of Congress to abandon that policy should not be presumed from

[1] *In re Stoever* (D. C. Pa.), 127 Fed. 394; *In re Western Implement Co.* (D. C. Minn.), 166 Fed. 576; S. C. (C. C. A. 8th Ct.), 171 Fed. 81, per Van Devanter, J.; *In re Devlin* (D. C. Kan.), 180 Fed. 170; *United States* v. *Birmingham Trust & Savings Co.* (C. C. A. 5th Ct.), 258 Fed. 562, 566, cert. denied, 251 U. S. 550; *In re Hibner Oil Co.* (C. C. A. 7th Ct.), 264 Fed. 667; *In re Tidewater Coal Exchange* (C. C. A. 2nd Ct.), 280 Fed. 648, cert. denied, 260 U. S. 721; *Matter of Atlantic, Gulf & Pacific Steamship Co.* (D. C. Md.), 289 Fed. 145; *In re Gubelman et al.* (C. C. A. 2nd Ct.), not reported; *Cf. Walkof* v. *Fox,* 153 N. Y. Supp. 27.

provisions of the Bankruptcy Act of 1898 which are fairly susceptible of another construction. *Holden* v. *Stratton,* 198 U. S. 202.

Point II

Since Section 3466, R. S., was not expressly repealed by the Bankruptcy Act of 1898, the Government's right of priority could have been destroyed only by such inconsistency or repugnancy between the two statutes as makes it impossible to give effect to both of them

Since the problem is to ascertain whether Congress intended by the Bankruptcy Act of 1898 to destroy the Government's priority for debts other than taxes, the following rules of statutory construction are pertinent:

1. Generally, the United States is not bound by the words of a statute unless named therein, if the statute tends to restrain or diminish its rights, powers, or interest. *United States* v. *Herron,* 20 Wall 251; *Lewis, Trustee,* v. *United States supra; Guarantee Company* v. *Title Guaranty Company, supra.*

2. That principle of statutory construction was applied by this court in the cases above cited to insolvency laws. It is founded in the presumption that when the legislature intends to divest the sovereign of any right, privilege, title, or interest it will do so in express words, and where the act contains no words to express such an intention it will be assumed that it did not exist. *United States* v. *Herron, supra.*

3. The construction of a statute depriving the Government of any right, privilege, title, or interest is unwarranted unless demanded by the most explicit verbiage or irresistible implication. *Murray* v. *Wilson Distilling Co.,* 213 U. S. 151. *Cf. Guarantee Company* v. *Title Guaranty Company, supra.*

4. Repeals by implication are not favored and will not be found to exist if there is any other reasonable construction. *Barney* v. *Dolph,* 97 U. S. 652, 656; *Beals* v. *Hale,* 4 How. 37, 53.

5. This principle is particularly applicable and most strictly enforced where the implied repeal would operate to deprive the Government of an existing right. *The Reform,* 3 Wall. 617, 633; *Wood* v. *United States,* 16 Pet. 342, 363; *United States* v. *Walker,* 22 How. 299, 311.

6. To repeal by implication there must be such a repugnancy between the old law and the new that they can not stand together. *Barney* v. *Dolph, supra; Beals* v. *Hale, supra.*

7. Section 3466 R. S. and Section 64 of the Bankruptcy Act of 1898 are *in pari materia, Lewis, Trustee* v. *United States, supra; Guarantee Company* v. *Title Guaranty Company, supra; Plummer* v. *Murray,* 51 Barb. (N. Y.) 201, 202; *Kohlsaat* v. *Murray,* 96 U. S. 153, 160, and must be construed together as parts of the same statute enacted at the same time.

Point III

Since it is possible to give effect to both statutes by construing the term "person" as used in Section 64 b (5) of the Bankruptcy Act of 1898 to include the United States, that construction must be adopted.

There is an inconsistency between Section 3466, R. S., and Section 64 of the Bankruptcy Act, and to the extent of that inconsistency, but no further, the former must yield to and is superseded by the latter. By the Revised Statutes there is no distinction between the claims of the Government. Whatever their character, they must be first satisfied. There is no superior right of priority. The Bankruptcy Act differentiates between taxes and other debts due the Government and subordinates the latter to wages within prescribed limits. As this court said in *Guarantee Company* v. *Title Guaranty Company,* ubi supra, 159, 160:

> It will be seen, therefore, that by the statute of 1797 (now §3466) and §5101 of the Revised Statutes all debts due to the United States were expressly given priority to the wages due any operative, clerk, or house servant. A different order is prescribed by the act of 1898, and something more. Labor claims are given priority, and it is provided that debts having priority shall be paid in *full.* The only exception is "taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality." These were civil obligations, not personal conventions, and preference was given to them, but as to debts we must as-

> sume a change of purpose in the change of order. And we can not say that it was inadvertent. The act takes into consideration, we think, the whole range of indebtedness of the bankrupt, national, state, and individual, and assigns the order of payment. The policy which dictated it was beneficent and well might induce a postponement of the claims, even of the sovereign in favor of those who necessarily depend upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimants.

There is no intimation in the court's opinion that the claims of the Government thus *postponed* to those of wage earners are denied all priority, and the Bankruptcy Act is fairly susceptible to no other construction than that Congress intended, not to destroy the Government's priority but merely to change its order of payment. Construed in that manner the sole inconsistency between the Bankruptcy Act and Section 3466, R. S., disappears. Construed in that manner, the two statutes become harmonious and full effect is given to both of them. Construed in that manner, it becomes unnecessary and impossible to conclude Congress intended to destroy the Government's priority in a manner so subtle that it has escaped detection for a generation.

That construction does not involve the creation of a right by implication; it merely avoids the *destruction* of a right in that manner.

Obviously Section 64 of the Bankruptcy Act is not self-sufficient. It deals with priorities, but it does not contain within itself everything essential to determine what debts have priority or what their relative order of payment shall be. It is not a separate code of priorities, unlimited and unenlarged by other statutory provisions dealing with the same subject. *City of Richmond* v. *Bird,* 249 U. S. 174; *Oliver* et al. v. *United States* et al. (Adv. Op. No. 180, Oct. Term, 1924). In the latter case the court said:

> Paragraph "a" directs that "the court shall order the trustee to pay all taxes legally due and owing * * * in advance of (*not next preceding*) the payment of dividends to creditors"—that is, partial payments to general creditors. *City of Richmond* v. *Bird,* supra. It does not undertake otherwise to fix the precise position which shall be accorded to them. This, we think, must be determined upon consideration of the circumstances of each case and the provisions of relevant Federal and local laws—e. g., those which prescribe liens to secure or special priority for tax claims. It also appears, plainly enough, that all debts mentoned in Paragraph "b" must be satisfied before any payment to general creditors.
>
> *Guarantee Co.* v. *Title Guaranty Co., supra,* declares that the taxes of Paragraph

"a" are "civil obligations, not personal conventions, and preference was given to them" over the wages specified by Clause (4), Paragraph "b." We adhere to this as a correct statement of the general rule to be followed whenever it does not clearly appear that the particular tax has been subordinated to claims for wages by some relevant law.

Section 64 b (5) expressly incorporates within itself all Federal and state laws *in pari materia.* Section 3466, R. S., is, of course, such a law, and the two laws must therefore be read and construed together. There is no difficulty in giving effect to both of them. If the word "person" in Section 64 b (5) of the Bankrupty Act is construed, as it must be construed, to include the United States, the priority accorded to the United States by Section 3466 for debts other than taxes is preserved and only the order of its priority is changed. That construction is imperatively required, not only by rules of statutory construction but by the language of the Bankruptcy Act itself.

Point IV

The United States is a person within the meaning of Section 64 b (5) of the Bankruptcy Act of 1898

Section 64 b (5) of the Bankruptcy Act must be considered in connection with the following provisions of Section 1:

> Section 1. Meaning of Words and Phrases.—a The words and phrases used in

this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be considered as follows: * * * (6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association; * * * (19) "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; * * * (24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia.

In its opinion the court below made no reference to, and as far as appears from its opinion, did not consider, the statutory definition of "corporations." That definition is by its terms all inclusive.

All bodies having *any* of the powers and privileges of private corporations not possessed by individuals or partnerships are included. The definition is not limited to private corporations or to private bodies having such powers and privileges.

Nor is the scope of the definition restricted by the express inclusion of certain limited or other partnership associations. *In re Harper,* 175 Fed. 412, 423. If Congress had intended to restrict the definition of " corporations " to private corporations or private partnership associations, it is hardly to be assumed that such inappropriate language as *all bodies* would have been used for that purpose.

That the United States and the States have the juridical status of corporations has been declared by this court and the State courts from the earliest times. *Cotton* v. *United States,* 11 How. 229, 231; *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 154; *Respublica* v. *Sweers,* 1 Dall. (Pa.) 41; *People* v. *St. Louis,* 10 Ill. 351; *Territory* v. *Hildebrand,* 2 Mont. 426; *State of Indiana* v. *Woram,* 6 Hill (N. Y.) 33; *Dickson* v. *United States,* 125 Mass. 311. See also *United States* v. *Maurice,* 2 Brock. 96, Fed. Cas. No. 15747; *Dixon* v. *United States,* 1 Brock. 177, Fed. Cas. No. 3934. In the *Maurice* case, Chief Justice Marshall, sitting as a circuit justice, said:

> The United States is a government, and, consequently a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment. This great *corporation* was ordained and established by the American people, and endowed by them with great powers for important purposes. (Italics ours.)

As a corporation the United States possesses some of the powers and privileges of private cor-

porations, e. g., the powers and privileges of perpetual succession, of suing and, with its consent, being sued, and of contracting in its own name. Hence, the United States must be regarded as a corporation and, therefore, as a person as that term is used in Section 64b (5) of the Bankruptcy Act of 1898, unless to include the United States would be inconsistent with the context. There is nothing in the text of Section 64 which makes it inconsistent to construe the word "person" in that manner. It is therefore mandatory upon the courts so to construe it. There is no choice; it is so written.

It struck the court below as strange that the United States should be referred to in the Bankruptcy Act of 1898 as a person. This court, however, has not hesitated to classify the United States and the several States as persons. *Stanley* v. *Schwalby,* 147 U. S. 508, 517; *Cotton* v. *United States, supra.* See also *State of Indiana* v. *Woram, supra; Republic of Honduras* v. *Soto,* 112 N. Y. 310; *Giddings* v. *Holter,* 19 Mont. 263; *Peters* v. *Grubb,* 21 Pa. St. 455, 465; *State* v. *Herold,* 9 Kans. 194, 199.

The failure to include the United States and the States by name within the statutory definitions of "corporations" and "persons" is without significance. The concept of the United States and the States both as corporations and as persons, was a familiar one long prior to the enactment of the Bankruptcy Act. Furthermore, in other sec-

tions of the Bankruptcy Act the United States and the States are plainly included within the word "persons."[2] It is true, of course, that the word "persons" never includes the United States or the States where their inclusion would be inconsistent with the context. The fact that the word "persons" is used at any place in the Bankruptcy Act as inclusive of the United States and the States where consistent with the context, is convincing proof of the meaning of that word as used in Section 64b (5).

Throughout the Bankruptcy Act the United States and the States are obviously included, not only within the word "persons" but within other generic terms.[3] Indeed, the draftsman's purpose was evidently to avoid repetition as much as possible by the use of definitions. The United States and the States as distinguished from their courts, laws, territories, etc., are expressly mentioned in the Act only in six instances,[4] one of which is Section 64

[2] E. g. Sections 14b(3), as amended, 1903 and 1910, 7a(9), 48e, as amended, 1910, and 70a(3).

[3] They are obviously included within the term creditors as used in Sections 3a(1), 39a(2), 57i, within the term claimants, as used in Sections 21c, 57c, 65e, and within the term parties, as used in Sections 24b, 39a(9), 47a(2).

[4] SECT. 1. (24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia.

SECT. 17. Debts not Affected by a Discharge. *a* A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the *United States*, *the State*, county, district, or municipality in which he resides.

SECT. 50. Bonds of Referees and Trustees. *h* Bonds of referees, trustees, and designated depositories * * * may be sued upon in the name of the *United States* * * *.

SECT. 57. Proof and Allowance of Claims. *j* Debts owing to the *United States*, a *State*, a county, a district, or a municipality as a

a. In each of those instances it is manifest that it would have been impossible to avoid expressly naming the United States and the States by the use of any of the words defined in Section 1. In no instance in which the United States and the States could be appropriately included within generic terms have they been referred to *eo nomine*.

The failure expressly to name the United States and the States in Section 64b (5) would, therefore, seem to be without significance. There is no reason why that one paragraph should have been made an exception to the draftsman's general practice of avoiding repetition by the use of generic terms whenever possible.

This court has held, *Guarantee Company* v. *Title Guaranty Company, ubi supra,* 158, that the United States is included within the term "creditor" as defined in Section 1 (9), which is as follows:

> (9) "Creditor" shall include *anyone who* owns a demand or claim provable in bankruptcy, and may include *his* duly authorized agent, attorney, or proxy. (Italics ours.)

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penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transactions, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby, and such interest as may have accrued thereon according to law.

SECT. 61. Depositories for Money. *a* Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, * * * and shall require bonds to the *United States*, subject to their approval, to be given by such banking institutions, * * *.

SECT. 64. Debts which have Priority. *a* The Court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the *United States*, *State*, county, district, or municipality in advance of the payment of dividends to creditors * * *. (*Italics ours.*)

If the United States is included within the term "creditor," it can only be because it is also included within the word "anyone." We have some difficulty in understanding why the United States may not be appropriately described as a "person" in Section 64b (5), if it may be included within the word "anyone" and the pronouns "who" and "his." Throughout the Act the United States is frequently included within *personal* pronouns.[5] The contention that the United States is not entitled to priority for debts other than taxes under the Bankruptcy Act of 1898 is largely predicated upon its inclusion within the term "creditors," an inclusion made possible only by the fact that the United States may be appropriately referred to as "anyone." And yet those who make the contention cavil at the inclusion of the United States in the word "person" in Section 64b (5).

Thus the Bankruptcy Act contains within itself the guides to its own construction. There is no occasion to look beyond its confines and to seek extraneous aids to construction in the form of prior bankruptcy acts or the legislative history of the present Act. The Bankruptcy Act points irresistibly to the conclusion that the United States is a person within the meaning of 64b (5). It therefore recognizes the Government's priority for debts other than taxes under Section 3466, R. S., a law of the United States.

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[5] 1a (23) [who, his]; 39a (1) [whom] 59b [who, whose]; 60a [his].

In fact, Learned Hand, J., sitting in the District Court, suggested in the *Tidewater* case that if the United States is not included within the term "person" as used in Section 64b (5), then, in so far as that section undertakes to preserve priorities created by the laws of the United States, it is meaningless, for—

> * * * So far as anyone has found it [the United States] is not only a "person" but the only "person" * * * entitled to priority "under any law of the United States."[6]

In answer it has been said that two classes of persons are entitled to priority under the laws of the United States, namely, (1) persons entitled to priority under the laws of the United States applicable to the District of Columbia and the Territories, and (2) sureties who are subrogated to the rights of the United States under Section 3468 R. S. This ignores the statutory definition of "States" (Section 1a (24)), as including the Territories, Indian Territory, Alaska, and the District of Columbia. In view of that definition, it is clear that if there were such laws when the Bankruptcy Act was passed they were regarded not as laws of the United States but as laws of the States. Furthermore, a careful search has failed to reveal that on July 1, 1898, there was in existence a single law theretofore enacted by Congress creating or regulating priorities in the District of Columbia or

[6] Quoted in *United States* v. *Wood*, 290 Fed. 109, 114.

in the Territories, and we have been referred to none.

The suggestion that Section 64b (5) was designed to preserve the rights of sureties on bonds for taxes under Section 3468 R. S. is equally untenable. In *United States* v. *National Surety Company, supra,* 75, this court said:

> Section 3468, applying an established rule of the law of subrogation, *Lidderdale* v. *Robinson,* 12 Wheat. 594, 596, declares that when a "surety pays to the United States the money due upon * * * (a) bond, such surety * * * shall have the *like priority* for the recovery * * * of the moneys * * * as is secured to the United States. (Italics ours.)

It is clear that the priority "secured to the United States" in such cases is a priority for *taxes* and is therefore included within Section 64a and not within Section 64b of the Bankruptcy Act. The surety, having *like priority,* would enforce it under paragraph *a* rather than under paragraph *b* of Section 64. If the priority of the United States under Section 3466 R. S. is not perpetuated by Section 64 b (5), then it is clear that the priority of sureties under Section 3468 R. S. is not continued by that part of the Section, for otherwise the surety would be subrogated to a right which is nonexistent.

The suggestion is also made that if Judge Hand was correct, Congress would have expressly named

the United States in Section 64 b (5) as the only person entitled to priority under the laws of the United States. Whatever validity that suggestion might have were Section 64 b (5) confined to persons entitled to priority under the laws of the United States, disappears in the light of the fact that that Section also perpetuates priorities under the laws of the States. The plain purpose of the statute, as far as the priority of the United States for debts other than taxes is concerned, was to put the United States on a parity with persons entitled to priority under the State laws; it was, therefore, perfectly logical to include the United States and all such persons in a single generic term comprehensive enough to include both the United States and such other persons.

Moreover, the suggestion resolves itself into this, that since different and more explicit language might have been used in the statute, therefore the language actually used is without meaning.

If the United States is not a person within the meaning of that term as used in Section 64 b (5), neither are the several States, as the court below recognized. During the century which preceded the enactment of the bankruptcy law priority for payment of debts due the States was as fundamental in their policy as in the policy of the United States. See *Marshall* v. *New York*, 254 U. S. 380. It may well be doubted that Congress intended so lightly and by such an indirect method to deprive the sov-

ereign States of rights which they had so long possessed.

It has been said that it is inconceivable that Congress intended to preserve the priorities of the United States and the States by means of a definition which did not name them but which was comprehensive enough to include them. It is much more difficult to conceive that Congress intended to deprive the United States and the States of their priorities by a failure to name them in a definition broad enough to include them.

Furthermore, if the construction of Section 64 b (5) which would deprive the United States in bankruptcy proceedings of priority for debts other than taxes, is correct, then an intention must be imputed to Congress to discriminate between the creditors of those insolvents who are adjudged bankrupts and those who are not, for admittedly Section 3466 R. S. is still operative except in the field of bankruptcy. It is difficult to understand why Congress should have desired to give the United States priority as against the estates of deceased insolvents, for example, and to deny the United States a like priority against the estates of living bankrupts.

With the single exception of the learned court below the lower federal courts have uniformly placed the construction for which we contend upon the Bankruptcy Act. Furthermore, it would seem that the question is no longer an open one in this court. *United States* v. *National Surety*

Company, 254 U. S. 73; *Guarantee Company* v. *Title Guaranty Company, supra.* The court below was of the opinion that the *National Surety* case did not decide the question, and that the *Guarantee* case supported its conclusion that the United States has no priority in bankruptcy except for taxes. It would be a work of supererogation for counsel to argue to this court what it did or did not decide in a given case, and yet we find it difficult to believe that this court, with knowledge of the trend of decision in the lower courts, would have gone through the form, in the *National Surety* case, whatever the concession of counsel may have been, of determining the relative priorities of parties, neither of whom in its opinion was entitled to any priority either as against the other or as against anyone else, or would have taken such pains, in the *Guarantee* case, to demonstrate that wages were to be paid before debts due the United States if in its opinion the United States ranked merely as a general creditor.

Point V

Neither the phraseology of the Act of 1898, considered in connection with that of prior bankruptcy acts, nor the legislative history of that Act, discloses any purpose to destroy the priority of the United States for debts other than taxes

Since the terms of the Act of 1898 make it clear that the United States is included as a person in Section 64 b (5), it would seem that if resort is

made to aids to construction, it must be for the purpose of creating rather than of solving an ambiguity.

Since prior bankruptcy acts reaffirmed the priority of the United States *eo nomine* for debts as well as taxes, and since the Acts of 1841 and 1867 also provided for the priority of *persons* entitled thereto under the laws of the United States, it is contended, first, that the failure of Congress to recognize the priority of the United States in the Act of 1898 in the identical terms in which that recognition was couched in prior acts resulted in the destruction of that priority; and, second, that because the United States was not included in the word "persons" as used in the priority clauses of previous acts, it could not have been intended to include the United States in that word when repeated in Section 64 b (5) of the present Act. It is also contended that the legislative history of the Act of 1898 demonstrates the correctness of that argument.

The differences in phraseology between the priority clauses of prior bankruptcy acts and that of the present Act is sufficiently explained by the legislative purpose to assign a different order of payment to the priority of the United States and of the States for their debts. In the Act of 1867, for example, the order of priority was (1) costs of administration; (2) debts and taxes due the United States; (3) debts and taxes due the States; (4) wage claims; and (5) debts due persons entitled to

priority under the laws of the United States. The reason why the United States was not included in the fifth order of priority in the Act of 1867 was not because the meaning of the word " persons " is not comprehensive enough to include the United States, but because Congress intended that both debts and taxes due the United States should have a higher order of priority than that granted other " persons." The United States was not included in the word " persons," as there used, only because the context shows that it was not the legislative intent that it should be.

The Act of 1898 made radical changes in the order of priority contained in the Act of 1867. *Guarantee Company* v. *Title Guaranty Company, supra.* Congress no longer desired the United States to have any priority over the States for either debts or taxes, or the United States and the States to have priority for their debts, other than taxes, over debts owing to other persons who were entitled to priority. In execution of the legislative intent provision was therefore made in Section 64a for the equal priority of the United States and the States for their respective taxes, and in Section 64 b (5) for the priority of the United States, the States, and all other persons entitled to priority.

The meaning of the word " person," as used in the priority clause of the Act of 1898 is therefore not restricted by its context as it was in the Act of 1867. In view of the comprehensive manner in which the word " persons " is defined in the Act of

898, and of the habitual practice of the draftsman o employ generic terms wherever possible, the ording of Section 64–b(5) is skillfully designed o accomplish the legislative intent to preserve the riority of the United States for debts other than axes and at the same time to place the United States, with respect to such debts, on an equality with the States and other persons entitled to priority.

In *Benziger* v. *United States*, 192 U. S. 38, it appeared that the tariff acts prior to 1897 placed "statuary" and "casts of plaster of Paris" in the free list. In the Act of 1897 "casts of plaster of Paris" were omitted from the free list. It was accordingly argued that it must have been the intention of Congress to make them dutiable. This court held that they were included in the words "statuary" and said at p. 47:

> *We do not attach any very great importance, as evidence of the intention of Congress, to the omission in the act of 1897 above referred to.* The language used in paragraph 649 is very broad, including all casts of sculpture, as well those heretofore mentioned in paragraphs in prior statutes similar to paragraph 638 as others. The omission in the latter paragraph was, therefore, immaterial if these figures are casts of sculpture. Although they might heretofore have come in under the designation of "casts of plaster of Paris," as contained in the former paragraphs, we think they also

> might have come in under the designation "casts of sculpture" contained in the act of 1894 as well as in the act of 1897, and that it was not intended by Congress, in omitting the words in the latter act as to casts of plaster of Paris, in paragraph 638, to prevent their free entry under paragraph 649. The language in paragraph 638 was simply unnecessary in a case where the same articles were entitled to free entry under another paragraph. (Italics ours.)

In *United States* v. *Herron, supra,* it was held that the word "creditor" as used in the Act of 1867 did not include the United States. In *Guarantee Company* v. *Title Guaranty Company, supra,* this Court held that the United States was included in the term "creditor" as used in the Act of 1898. In the light of those decisions and of the elaborate definitions contained in the Act of 1898 it is impossible to contend that words used in that Act should be given, regardless of the context, the same meaning which they had when used in the Act of 1867.

Nor does the legislative history of the Act of 1898 disclose any intention to deprive the United States of priority for debts in bankruptcy proceedings.

Between the date of the repeal, in 1878, of the Bankruptcy Act of 1867 and the enactment of the Bankruptcy Law of 1898, there were introduced into Congress more than eighty bills dealing with bankruptcy. Obviously, all of them are not included in the legislative history of the Act of 1898. That history began with the introduction in the

Senate in April, 1898, of the Lindsay Bill (Cong. Rec. 55th Cong., 1st Sess., pp. 601–609), the priority clause of which is as follows:

> SECTION 65. *Debts which have priority.*—a. Debts owing to the United States, a State, county, parish, being a political corporation, district, or municipality, after being proved and allowed, shall have priority only in the event and to the extent that they constitute a lien upon the property of the estate.
>
> (b) The debts to have priority, except as herein provided, and to be paid in full out of bankrupts' estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration, * * * (4) wages due to workmen, clerks, or servants which have been earned within three months of the date of the commencement of the proceedings, not to exceed $300 to each claimant; and (5) debts owing to any person which by the laws of the United States or a State are entitled to priority.

The Lindsay bill was amended in the Senate by striking therefrom everything after the enacting clause and by substituting therefor the Nelson bill (Cong. Rec., 55th Cong., 1st sess., pp. 799, 800), the priority clause of which was as follows:

> SEC. 9. That the following debts shall have preference in the order named, over other debts in the distribution of the estate of the

> bankrupt, to wit: First, debts due to the servants and laborers employed by the bankrupt for labor performed or services rendered within six months prior to the filing of the said petition. Second, taxes or revenues due the United States. Third, taxes due any state or territory or the District of Columbia. Fourth, taxes due to any county, parish, town, city, or village in the order named. But none of said debts shall be recognized or paid unless duly approved and allowed as prescribed in reference to other debts and claims against the bankrupt.

The Nelson Bill passed the Senate, but was amended in the House by striking therefrom everything after the enacting clause, and by substituting therefor a bill prepared by the Judiciary Committee of the House. (55th Cong. 2d Sess., H. R. Report 65, Cong. Rec. pp. 1778.) The priority clause of the House bill is identical with that of the Bankruptcy Act of 1898.

The House Bill and the Nelson Bill then went to conference and the conferees reported back (Senate Doc. 294, 55th Cong. 2d Sess.), as follows:

> That the Senate recede from its disagreement to the amendment of the House, and agree to the same with an amendment as follows: Strike out all of said amendment and insert in lieu thereof the following: (Exhibit A hereto annexed and made part of this report.) And the House agrees to the same.

Exhibit "A" became the Bankruptcy Act of 1898.

Such inferences as may reasonably be drawn from the legislative history of the present Act support the view that it was not the legislative intention to destroy the Government's priority for debts in bankruptcy proceedings. The provision in the priority clause of the Lindsay bill and certain prior bills that "debts owing to the United States * * * shall have priority *only* in the event and to the extent that they constitute a lien upon the property of the estate," shows clearly that the authors of those bills recognized that the unqualified priority of the United States under Section 3466, R. S., would continue unless expressly limited, and that their purpose was to restrict the Government's priority to instances where the Government's debt constituted a lien. That limitation was omitted from Section 64 of the conference bill which became the Act of 1898, and which contains no limitation upon the Government's priority for debts, but merely assigns to it a different order of payment.

There is not a single suggestion in the Congressional Record or in the committee reports that the bill which became the present Bankruptcy Act would have the effect of destroying the priority of the United States for debts in bankruptcy proceedings. In the twenty-seven years that have elapsed since the present Bankruptcy Act became a law Congress has seven times amended other parts of the Act and has twice amended Section 64 (32 Stat. 797, c. 487, § 14; 34 Stat. 267) with full

knowledge of the uniform construction which the courts were placing upon it, and yet none of these amendments makes any change in Section 64 b (5).

To say that if Congress had intended by the Act of 1898 to continue the Government's priority for debts as well as for taxes it would not have permitted the Government's right to such priority to rest upon ambiguous definitions and implications, is to view the question obliquely. It is very much more accurate to say that it could not have been the intention of Congress to destroy the Government's priority for debts by an implication which can be arrived at only by a most tortuous and elaborate process of reasoning.

As Senator Hoar, of Massachusetts, said in the Senate (Cong. Rec. 48th Cong. 1st Sess. p. 3004) upon the only occasion on which, as far as we have been able to discover, the Government's right to priority was ever discussed in Congress during the twenty-year interval between the repeal of the Act of 1867 and the enactment of the present law:

> It is the universal policy, I believe, of every state in this country and of every civilized government, and has been the uniform policy of this Government, from its foundation to give preference as against insolvent estates, whether of deceased persons or living persons who are insolvent, to its own debts and taxes, which are presumed to have been matters incurred for the carrying on of the Government itself, which is the paramount necessity of all

necessities. Now, it seems to me if that policy is to be changed it ought to be changed by some special enactment applicable to all cases alike. Why the United States should have its preference against the insolvent estate of every deceased person in the country and why it should reserve the advantage of having no statute of limitations run against it and all the other advantages, and then a Senator come in and make this little attack on the policy in a bankrupt law, I do not understand. I think that should be left to general legislation. I hope the provision will not be changed. If you remove the advantage of the United States you have also to remove the advantage from the States.

Point VI

Congress having declared it to be the national policy that the Government should have priority in bankruptcy proceedings for both debts and taxes, the wisdom of the policy is not open to question in the courts. Moreover, the policy declared by Congress accords with the dictates of a sound policy

As was said in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 340, "when the lawmaking power speaks upon a particular subject over which it has constitutional power to legislate public policy in such a case is what the statute enacts." If that is true, it has undoubtedly been the national policy from the very beginning of the Republic, at least to the enactment of the present bankruptcy law, that the Government

should have priority of payment of all its demands. It strains credulity to believe that Congress intended to reverse that policy in the present bankruptcy act in a manner so difficult of detection that for almost a generation the bench and bar have been unaware of the legislative purpose.

The wisdom of the policy is a question for legislative and not for judicial consideration. If the present bankruptcy act preserves the Government's priority for debts as well as for taxes in bankruptcy proceedings, such priority continues to be a part of the national public policy. If the present bankruptcy act destroys the Government's priority, it is no longer a part of the national public policy. In the former case the wisdom of the policy is not open to question outside of the halls of Congress, and in the latter case it is entirely irrelevant.

After all, what is the question of public policy involved? It is obviously who should bear the loss sustained by the Government as the result of the insolvency of its debtors followed by bankruptcy—the Government, the bankrupt's general creditors, or the public. Clearly the loss must be borne either by the public or by the bankrupt's general creditors. The Government has no capital upon which it can draw to meet its losses. It can meet them through taxation, which means, of course, that in the last analysis the taxpayers will bear them. Accordingly, the question of policy is whether such losses should be met by taxation to the detriment of the public or from the assets of the Government's

debtors to the detriment of general creditors. The only factors to be considered, therefore, in determining the question of policy are the public and the general creditors.

What reason is there for fastening this loss upon the public rather than upon the general creditors? The taxpayer is a defenseless bystander. Of his own accord, the general creditor has entered into some business transaction for the purpose of gain. To earn a profit the general creditor is willing to assume the risks inherent in business transactions, one of which is that his debtor will fail, indebted not only to him but to the Government, State, and municipality for taxes, to the landlord for rent, to wage earners, and to other persons entitled to priority of payment from the bankrupt's estate. If the Government's priority extends to debts other than taxes, the risk of the general creditors is only slightly increased, and it can not be magnified by attempts to picture the Government as being actively engaged in commerce. In any event, if the risks are so great that the possibility of loss overpowers the desire for profit, the general creditor will not assume them. If he does assume them and suffers a loss, unlike the taxpayer, he has a chance to recoup that loss from his next venture.

If, as this court has said in *United States* v. *Bank of North Carolina,* 6 Pet. 29, 35, the Government's right of priority is designed to secure an adequate revenue to sustain the public burdens and to discharge the public debts, there would seem to be no

greater reason for giving the Government priority for taxes than for its other debts. It is a matter of common knowledge that the Government's priority for taxes does not result in their payment in the year in which they are due. In practically every case in which the Government claims priority for taxes, they have lost their character as part of the current revenues, and are not available to meet the necessities of current operations. It is true that if they are not paid at some time, the deficit will have to be met in some way, but that is equally true when the Government sustains other losses as the result of the insolvency of its debtors. A dollar lost by the Government must be replaced, whether it was originally payable as the result of a civil obligation or of a personal convention. It is difficult, therefore, to appreciate the reasons which make it a desirable policy to impose upon general creditors the loss of to-day's taxes, and an undesirable policy to impose upon them the loss of the taxes of to-morrow necessary to make good uncollectible debts.

If the question were whether the Government or the general creditor should bear the loss, then the origin of the obligation might be a material consideration, but it seems entirely immaterial in determining whether the incidence of the loss should be upon the taxpayer or upon the general creditor. Whatever the character of the loss, the taxpayer or the general creditor must bear it. The question therefore becomes solely a question of their relative

equities, and those of the taxpayer seem to be as great, to say the least, as those of the general creditor.

If, as Congress has declared, it is a sound policy that the general creditors of a bankrupt should bear the losses resulting from bankruptcy in taxes, rent, wages, and other indebtedness of the bankrupt; if, as Congress has declared, it is a sound policy that the Government should have priority for its debts other than taxes when bankruptcy does not follow insolvency, it is difficult to see why it is not an equally sound policy that the Government should have priority in bankruptcy for all of its debts. There would seem to be little reason for any discrimination between general creditors of a bankrupt and the general creditors of living and deceased insolvents who have not been adjudged bankrupts.

As a matter of fact, every consideration which is to-day advanced against the wisdom of the policy of the Government's priority was raised with at least equal force more than a hundred years ago by Mr. Justice Washington in his dissenting opinion in *United States* v. *Fisher,* 2 Cranch. 358, 402. Nevertheless, in the century that has intervened, Congress has repeatedly adhered in legislation to that policy. With knowledge of the construction placed by the federal courts upon Section 64 of the Bankruptcy Act, Congress has amended that Act no less than nine times, and has amended Sec-

tion 64 twice, and yet no change whatever has bee
made in Section 64 b (5).

In these circumstances it seems particularly ap
propriate to refer to the language used by Mr. Jus
tice Miller in *Smoot's Case,* 15 Wall. 36, 45:

> There arises in the minds of the partie
> and counsel interested for the individua
> against the United States a sense of th
> power and resources of this great govern
> ment, prompting appeals to its magnanimit
> and generosity, to abstract ideas of equity
> coloring even the closest legal argument
> These are addressed in vain to this court
> Their proper theatre is the halls of Con
> gress, * * *
>
> It would be very dangerous, indeed, to th
> best interests of the Government * *
> if, adopting the views so eloquently urged b
> counsel, that court, or this, should depar
> from the plain rule laid down above and ren
> der decrees on the crude notions of th
> judges of what is or would be morally righ
> between the government and the individual

B

THE SECOND QUESTION

Point VII

**This court has repeatedly held that claims of the Direc
tor General of Railroads arising out of federal con
trol are claims of the United States of America in it
sovereign capacity**

The decision of the learned district judge (R
pp. 16, 17) that

> * * * For all these charges the Government Agent has a lien upon the articles transported. It was the duty of that Agent to have collected all these charges before delivery of the articles to the consignees. Having seen fit to waive that lien and deliver the articles to the consignee without collecting the charges for which he had a lien the Agent of the Government under the circumstances of this case is not entitled to a prior lien upon the general estate of the bankruptcy consignee,

is obviously erroneous in that the articles were not delivered to the consignee but were sold and the proceeds applied in part payment of the amounts due for freight, storage, demurrage, and war taxes. (Tr. pp. 11, 13.) The opinion of the district judge in this respect was wholly disapproved by the circuit court of appeals, Judge Woods saying:

> We are unable to agree with the Referee and the District Judge that the debts due to the Director General were not debts due to the United States of the character given priority by Section 3466 of the Revised Statutes. The Supreme Court has decided otherwise. (Petition for writ of certiorari, p. 22.)

In *DuPont De Nemours* v. *Davis,* 264 U. S. 456, 462, this court said:

> In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity, as a war meas-

ure, " under a right in the nature of eminent domain." *North Carolina R. R. Co.* v. *Lee,* 260 U. S. 16; *Missouri Pacific R. R. Co.* v. *Ault,* 256 U. S. 554; *Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135; *In re Tidewater Coal Exchange,* 280 Fed. 648, 649; and it may not be held to have waived any sovereign right or privilege unless plainly so provided. Moneys and other property derived from the operation of the carriers during Federal control, as we have seen, are the property of the United States. Sec. 12, 40 Stat. 457. An action by the Director General to recover upon a liability arising out of such control is an action on behalf of the United States in its governmental capacity. (*Ches. & Del. Canal Co.* v. *United States,* 250 U. S. 123, 126; *In re Tidewater Coal Exchange, supra.*)

The Federal courts in the various circuits have overwhelmingly sustained the contention that the Director General of Railroads is entitled to the same priority as the United States.

In re Hibner Oil Co. (C. C. A. 7th Cir.), 264 Fed. 667.

In re Tidewater Coal Exchange (C. C. A. 2d Cir.), 280 Fed. 648.

Davis v. *Pullen* (C. C. A. 1st Cir.), 277 Fed. 650.

Davis v. *Miller Link Co.* (C. C. A. 5th Cir.), 296 Fed. 649.

It has been held that the Government in operating the railroads acted in its sovereign capacity;

hat moneys derived from their operation are the roperty of the United States; that the Government n the collection of such moneys is not subject to me limitations; that the Government is not subject o penalties imposed upon the railroads by State ws even if enforceable against the railroads under rivate control; and that the Government may not e held to have waived any sovereign right or privege unless plainly so provided.

Du Pont de Nemours v. *Davis, supra.*

Davis v. *Corona Coal Co.,* 265 U. S. 219, 222.

Mo. Pac. R. R. Co. v. *Ault,* 256 U. S. 554, 559.

In *Davis* v. *Michigan Trust Co.,* 2 Fed. (2d) 94, 197 (certiorari granted), the Circuit Court f Appeals of the Sixth Circuit, disagreeing with he other circuits, held in an equity receivership hat section 10 of the Federal Control Act (40 Statutes, Mar. 21, 1918, c. 25 (Comp. Stat. Ann. Supp. 1919, Sec. 3115¾ j)) placed the Director General, when collecting money, in the same status s the carriers and subjected him to the rules previously applied to the railroads.

In *Davis* v. *Corona Coal Co.,* 265 U. S. 219, 222, his court said:

> The provisions of section 10 of the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451, 456, subjecting carriers "to all laws and liabilities as common carriers, whether arising under State or Federal

laws or at common law, except " &c., rightly was said by the counsel for the petitioner to do no more than subject operations of the carriers to existing laws.

This court has explained the distinction between the carriers, the Government as operator of railroads and the sovereign as owner of the moneys earned. The carriers were subject to all laws, Federal and State. Whatever the position of the Government as operator of the railroads may have been under section 10 and other applicable statutes (*Missouri Pacific R. R. Co.* v. *Ault*, 256 U. S. 554, 559, but see *Standard Oil Company of New Jersey* v. *Southern Pacific Co. et al.*, decided April 20, 1925, — U. S. —), as owner of the moneys earned, the United States has surrendered none of its sovereign rights or privileges (sec. 12)[1]; and it is in the latter capacity that the present claims are asserted. *Du Pont De Nemours* v. *Davis*, 264 U. S. 456, *Davis* v. *Corona Coal Co., supra.*

It necessarily follows that the claims asserted by the Director General in behalf of the United States are entitled to the same priority as all other debts due the Government.

[1] That moneys and other property derived from the operation of the carriers during Federal control are hereby declared to be the property of the United States. (Sec. 12, Act of Mar. 21, 1918, c. 25 40 Stat. 457.)

CONCLUSION

The orders should be reversed and the Court below directed to enter orders decreeing that the claims of the petitioner are entitled to priority over the claims of general creditors of the bankrupt.

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